

CAUSE NO.: C-0774-19-C

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SNOWBALL EXPRESS LLC,	§	IN THE DISTRICT COURT
	§	
Plaintiff,	§	
	§	
v.	§	HIDALGO COUNTY, TEXAS
	§	
CITY OF MISSION,	§	
	§	
Defendant.	§	139TH JUDICIAL DISTRICT

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**DEFENDANT’S ORIGINAL ANSWER, PLEA TO THE JURISDICTION, AND  
RESPONSE TO PLAINTIFF’S REQUEST FOR INJUNCTIVE RELIEF**

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TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES City of Mission, (hereinafter referred to as “City of Mission” or “Defendant”) Defendant in the above-styled and numbered cause, and files this Original Answer to Plaintiff’s Original Petition, Plea to the Jurisdiction, and Response to Plaintiff’s Request for Injunctive Relief and would respectfully show the Court as follows:

**I. GENERAL DENIAL**

1. Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant denies each and every, all and singular, the material allegations in Plaintiff’s Original Petition and demands strict proof thereof by preponderance of the credible evidence as required by the Constitution and the laws of the State of Texas.

2. Defendant reserves the right to amend this answer after it has had an opportunity to fully examine the allegations made by the Plaintiff in this cause of action.

## II. PLEA TO THE JURISDICTION

3. The City of Mission asks the court to dismiss Plaintiff's suit for of lack of jurisdiction. Plaintiff filed a petition seeking a declaratory judgment as to the constitutionality of an ordinance which prohibits the Plaintiff from operating its business at late hours. The court lacks jurisdiction over this action because the Plaintiff did not serve a copy of this proceeding to the Attorney General of Texas, and there is no showing of substantial compliance with the section of the Uniform Declaratory Judgments Act requiring service on the Attorney General. See Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b).

4. This court is obligated to determine, *sua sponte*, its jurisdiction in each case. *Welch v. McDougal*, 876 S.W.2d 218, 220 (Tex. App.—Amarillo 1994, writ denied).

Section 37.006(b) provides:

In any proceeding that involves the validity of a municipal ordinance or franchise, the municipality must be made a party and is entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state *must* also be served with a copy of the proceeding and is entitled to be heard.

Tex. Civ. Prac. & Rem. Code Ann. § 37.006(b) (emphasis added). Although subsection (b) does not require that the Attorney General be joined as a party to a proceeding, it does require that it must "be served with a copy of the proceeding and is entitled to be heard." *Id.* Furthermore, failure to provide notice to the Attorney General is a jurisdictional requirement which may not be disregarded. *Commissioners Court of Harris County v. Peoples National Utility Co.*, 538 S.W.2d 228, 229 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (reversing a district court's order of temporary injunction because the Attorney General was not served with a copy of the pleadings).

5. A review of the clerk's record does not indicate that the Attorney General was served as required by section 37.006(b). Therefore, this court is without jurisdiction and should dismiss the Plaintiff's cause and vacate the temporary restraining order.

### **III. RESPONSE TO PLAINTIFF'S REQUEST FOR INJUNCTIVE RELIEF**

6. Plaintiff, Snowball Express, LLC, sued Defendant, City of Mission, for declaratory judgment seeking to have an ordinance declared unconstitutional and void. The ordinance in question, passed on May 14, 2018, grants a conditional use permit for the Plaintiff to operate a drive-thru service window with the limitation that the Plaintiff's business must limit its hours of operation to close at 10:00 p.m. every day. This ordinance applies to the Snowball Express located at 1712 W. Griffin Parkway, Mission, Texas (there is a second Snowball Express in Mission, Texas located off 3124 N. Mayberry Road that is not the subject of this injunction).

7. The first application for a conditional use permit for the property in question was filed by the Plaintiff on October 3, 2013. In the initial application, Plaintiff declared his hours of operation to be from 2:00 p.m. through 10:30 p.m. every day. Pursuant to the first application, the City of Mission granted a conditional use permit on November 12, 2013. The Plaintiff was granted renewals over the next few years without any changes or further limitations on the hours of operation. For nearly a five year period, the Plaintiff had been functioning with a conditional use permit that had allowed him to operate his drive-thru service window until 10:30 p.m. every day. However, the City of Mission began receiving complaints in 2018 from members of the community who live in proximity to the Plaintiff's business and who were growing frustrated with the constant loud noises from vehicles, music, and rowdy customers who were patronizing the Plaintiff's business at

late hours of the night. The City of Mission also learned that the Plaintiff had been repeatedly violating the conditional use permit and was operating the drive-thru service window as late as 2:00 a.m. After the City of Mission informed the Plaintiff about the repeated violations and noise complaints and counseled Plaintiff to cease drive-thru operations after 10:00 p.m. as per the city ordinance, the Plaintiff began circumventing the use of the drive-thru window, during the late hours, by having his employees walk-up to the vehicles to take orders and then having the customers drive around the building to pick up their orders. In essence, the Plaintiff was continuing a drive-thru operation and was doing so after 10:30 p.m.

8. The Plaintiff applied for an amendment to his conditional use permit on March 28, 2018 asking the City of Mission to allow him to remain open until 2:00 a.m. on every day of the week. In light of the complaints made by the citizens of the City of Mission and to provide for the general health, welfare and safety of the citizens, the City of Mission exercised its police powers by granting the conditional use permit with a limitation to have all business operations close at 10:00 p.m.

9. Plaintiff filed a request for injunctive relief seeking to have the court restrain the City of Mission from enforcing the ordinance described above. The court granted an ex-parte temporary restraining order on February 19, 2019 and set a temporary injunction hearing for March 4, 2019.

10. To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Butnaru v. Ford Motor*, 84 S.W.3d 198, 204 (Tex. 2002). The City of Mission objects to Plaintiff's

request for injunctive relief because Plaintiff's application for injunctive relief does not show that Plaintiff has a probable right to the relief on a final hearing of the case. The applicant failed to plead that it is likely to succeed on the merits of its lawsuit and the application, and any injunction therefrom, is therefore defective and improper.

11. Furthermore, based on the reasons behind the City of Mission's decision to limit the Plaintiff's hours of operation, the Plaintiff will be unable to prove that he has a probable right to relief on a final hearing. The City of Mission's decision was neither arbitrary nor unreasonable but was a justified exercise of police power that was substantially and directly related to the noise complaints from the members of the community. The law provides that a city ordinance is presumed to be valid, and an "extraordinary burden" rests on one attacking a city ordinance. *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex. 1984). A city is allowed to enact reasonable regulations to promote the health, safety, and general welfare of its people. *Id.* Moreover, "if reasonable minds may differ as to whether a particular zoning ordinance has a substantial relationship to the public health, safety, morals, or general welfare, the ordinance must stand as a valid exercise of the city's police power." *Id.*

12. The City of Mission further objects to Plaintiff's request for injunctive relief because granting the relief will destroy, rather than preserve, the status quo. The status quo to be preserved by a temporary injunction is the last, actual, peaceable, noncontested status that preceded the controversy resulting in the suit. *In re Newton*, 146 S.W.3d 648, 651 (Tex. 2004); and *Edgewood Indep. Sch. Dist. v. Paiz*, 856 S.W.2d 269, 271 (Tex. App.—San Antonio 1993, no writ). In the instant case, the last actual, peaceable, and noncontested status that preceded the controversy was the prior ordinance that granted

a conditional use permit with hours of operation from 2:00 p.m. through 10:30 p.m. In fact, that is the ordinance that was passed pursuant to Plaintiff's own application setting forth those particular hours of operation.

13. Additionally, the status quo can never be a status that allows a party to continue violating the law. *San Miguel v. City of Windcrest*, 40 S.W.3d 104, 109 (Tex. App.—San Antonio 2000, no pet.). In this case, Plaintiff has repeatedly continued to violate the ordinance in question and is in current violation of the law. Therefore, the granting of an injunction that allows him to continue to violate the law would be defective and improper. As described above, the status quo that should be maintained is the requirement to adhere to the city ordinance prohibiting certain hours of operation.

14. The City of Mission further objects to Plaintiff's request for injunctive relief because Plaintiff is guilty of inequitable conduct and has "unclean hands" and thus is not entitled to injunctive relief. *See Truong v. City of Houston*, 99 S.W.3d 204, 212 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The inequitable conduct that Plaintiff has engaged in is the repeated violation of the prior and current city ordinance. Plaintiff's conduct has resulted in direct harm to the City of Mission who has been required to enforce, by issuance of citation, the ordinances in question.

15. For the aforementioned reasons, the City of Mission asks the court to deny Plaintiff's request for temporary injunction and vacate the temporary restraining order.

### **PRAYER**

WHEREFORE, PREMISES CONSIDERED, Defendant, City of Mission, respectfully prays that the court dismiss the Plaintiff's cause of action, deny the requested injunctive relief, and vacate the temporary restraining order. The City of Mission requests

that the court grant it judgment for all costs of court, attorney's fees, post judgment interest, and all further relief to which it may be entitled.

Respectfully submitted,

JONES, GALLIGAN, KEY & LOZANO, L.L.P.

By: /s/ Robert L. Galligan

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ATTORNEYS FOR DEFENDANT  
**CITY OF MISSION**

**CERTIFICATE OF SERVICE**

I certify that on March 4, 2019, a copy of **Defendant's Original Answer, Plea to the Jurisdiction, and Response to Plaintiff's Request for Injunctive Relief** was filed using the eFileTexas.gov, system which automatically serves a Notice of Electronic Filing (TRCP 21a) by electronic mail on the following attorney(s):

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